Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

KENNETH W. LEE,

Petitioner,

vs.

ROBERT C. HUGHES, JR., and
DANIEL C. LANFORD, JR.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

MYLES E. EASTWOOD
6445 Powers Ferry Road, N.W.
Suite 215
Atlanta, Georgia 30339-2909
(770) 541-9000

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

53 pp

QUESTION PRESENTED

1. Whether United States Probation Officers, as excepted service employees of the Judicial Branch, may bring *Bivens* actions for unconstitutional discrimination in their employment?

(The United States Court of Appeals for the Eleventh Circuit, in the case at bar, answered this Question in the negative, while the United States Court of Appeals for the Eighth Circuit has answered this Question in the affirmative.)

LIST OF ALL PARTIES IN COURT BELOW

Kenneth W. Lee

Robert C. Hughes, Jr.

Daniel C. Lanford, Jr.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, Kenneth W. Lee ("Mr. Lee"), respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit rendered in this case on July 9, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated July 9, 1998, is reported at 145 F.3d 1272, 1998 W.L. 380522 (11th Cir. 1998), and is reproduced in Appendix A to this Petition beginning on page 1a. The opinion of the United States District Court for the Middle District of Georgia vacating its prior order of dismissal and correcting typographical errors and substituting a new order of dismissal, filed January 29, 1997, is unreported and is reproduced in Appendix B to this petition, beginning at page 14a. The opinion of the district court filed April 2, 1997 denying the motion to alter, amend, vacate and set aside amended judgment is unreported and is reproduced in Appendix C to this petition, beginning at page 26a.

JURISDICTION

The judgment in the United States Court of Appeals for the Eleventh Circuit was entered on July 9, 1998. Pet. App. 1a. The jurisdiction of this Court is timely invoked

in 90 days thereof, pursuant to 28 U.S.C. §1254(1) (1988) and SUP. CT. R. 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case – the Fifth Amendment to the United States Constitution, §717(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-16(a)(1988), the Civil Service Reform Act of 1978, 5 U.S.C. §2302 (1988), and §§102, 201 and 505 of the Congressional Accountability Act of 1995, Pub.L. 104-1, 109 Stat. 3 *et seq.* – are set forth in Appendix D beginning at page 31a.

STATEMENT OF THE CASE

This is a *Bivens* action brought by a discharged United States Probation Officer against his chief and deputy chief probation officers, alleging race discrimination in the conditions and termination of his employment in the Middle District of Georgia, under authority of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), and *Davis v. Passman*, 442 U.S. 228 (1979).

Mr. Lee was hired in 1983 as a United States Probation Officer for the Middle District of Georgia. Pet. App. 2a, 16a. His veteran's status made him a preference eligible employee. Pet. App. 27a. As an employee of the U.S. Probation Service, he was an excepted service employee of the Judicial Branch. Pet. App. 18a, 27a.

Mr. Lee served as U.S. Probation Officer until his employment was terminated in 1996. At the time of Petitioner's termination, Respondent Daniel C. Lanford, Jr., was Chief U.S. Probation Officer for the Middle District of Georgia and Respondent Robert C. Hughes, Jr., was Deputy Chief U.S. Probation Officer. Pet. App. 2a, 16a. Petitioner Lee protested his termination and other conditions of his employment, on the grounds that they were improperly motivated by race. Pet. App. 2a, 16a.

Mr. Lee was provided an administrative remedy under the Model EEO Plan which was adopted by the Middle District of Georgia. Pet. App. 2a. A magistrate judge was appointed as investigator under the Plan, and he subsequently recommended approval of Petitioner's termination. Pet. App. 3a. The Chief Judge of the District accepted the report and approved the termination. The EEO Plan does not provide for a hearing upon request of the Plaintiff and none was held. Pet. App. 3a-4a.

Petitioner Lee then filed suit in district court against his supervisors, alleging unconstitutional race discrimination.[1] Pet. App. 4a. The district court dismissed the *Bivens* claim, holding that the Civil Service Reform Act of 1978 ("CSRA") preempted the field and was a special factor counseling hesitation in inferring a *Bivens* claim. Pet. App. 20a, 22a, 28a. The Eleventh Circuit Court of Appeals affirmed: "We hold that the CSRA precludes a

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[1] Petitioner's unsuccessful §1981 claim is foreclosed by the 1991 Civil Rights Amendments that, in subsection (c), expressly limited the §1981 remedy to unlawful state and private race discrimination. 42 U.S.C. §1981(c); Pet. App. 11a, 35a. Therefore, Petitioner does not seek review on this point.

Bivens remedy in this case notwithstanding the fact that the CSRA does not provide administrative or judicial review of the adverse action." Pet. App. 7a. The Court of Appeals noted: "We recognize that this case is troubling because Plaintiff was not afforded a Congressionally enacted judicial or administrative procedure through which to vindicate the alleged constitutional wrong." Pet. App. 9a.

REASONS FOR GRANTING THE WRIT

I. IT IS NECESSARY TO RESOLVE THE SPLIT IN THE CIRCUITS ON WHETHER UNITED STATES PROBATION OFFICERS, AS EXCEPTED SERVICE EMPLOYEES OF THE JUDICIAL BRANCH, MAY PURSUE *BIVENS* REMEDIES FOR UNCONSTITUTIONAL DISCRIMINATION IN THEIR EMPLOYMENT.

The Eighth Circuit Court of Appeals has held that a United States Probation Officer, because of this Court's holding in *Davis v. Passman*, 442 U.S. 228 (1979), may pursue a *Bivens* claim as an excepted service employee of the Judicial Branch, for unconstitutional discrimination in his employment. *Duffy v. Wolle*, 123 F.3d 1026, 1033-1035 (8th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1839 (1998). The Eighth Circuit found that implying a *Bivens* right of action in Probation Officer Duffy's case was quite straight-forward, given this Court's holding in *Davis v. Passman, supra*, allowing a Fifth Amendment claim for unconstitutional gender discrimination. 123 F.3d at 1033-34. The Eighth Circuit further held that the district

court EEO plan was not a special factor counselling hesitation. 123 F.3d, at 1034-35.

Likewise, the leading commentators also have opined that excepted service employees of the Federal Judiciary may bring *Bivens* claims for unconstitutional race or gender discrimination in their employment. 2 B. Lindemann & D. Grossman, EMPLOYMENT DISCRIMINATION LAW, p. 1565, "Employees of the Judicial Branch" (3rd ed. 1996).

In contrast, the Eleventh Circuit held in the case at bar that the Civil Service Reform Act of 1978 ("CSRA") was a special factor counselling hesitation. Pet. App. 7a, 11a. The Eleventh Circuit gave short shrift to *Davis v. Passman, supra,* Pet. App. 7a-8a, focusing on the enactment of CSRA, even though the Court of Appeals: "recognize[d] that this case is troubling because Plaintiff was not afforded a Congressionally enacted judicial or administrative procedure through which to vindicate the alleged constitutional wrong." Pet. App. 9a.[2] The Eleventh Circuit thereby overlooked this Court's detailed discussion of *Davis v. Passman,* involving an excepted service employee in the Legislative Branch, in this Court's opinion in *Bush v. Lucas,* 462 U.S. 367, 376-378 (1983), involving a competitive service employee of the Executive Branch. In holding that the statutory remedial scheme for

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[2] None of the cases deemed similar by the Eleventh Circuit (listed at Pet. App. 9a-10a) involved race or gender discrimination claims, but all did involve Executive Branch employees plainly encompassed by CSRA. Only *Duffy v. Wolle, supra,* involved (i) a discrimination claim, and/or (ii) an excepted service employee of a Judicial Branch agency.

Mr. Bush and similarly situated employees was the special factor counselling hesitation, the *Bush* Court nonetheless expressly distinguished the situation under CSRA of those for whom no statutory remedy at all was provided. *Compare Bush v. Lucas*, 462 U.S., at 378 & n. 14, *with id.*, 462 U.S., at 390-391 (Marshall, J., concurring).

II. THE ELEVENTH CIRCUIT HAS RULED CONTRARY TO THIS COURT'S BINDING PRECEDENT IN *DAVIS V. PASSMAN*.

This Court in *Davis v. Passman, supra,* prior to *Bush v. Lucas, supra,* had stated:

> Third, there is in this case "no *explicit* congressional declaration that persons" in petitioner's position injured by unconstitutional federal employment discrimination "may not recover money damages from" those responsible for the injury. *Bivens, supra,* 403 U.S. at 397. (Emphasis supplied).

Davis v. Passman, 422 U.S., at 246-247 (emphasis by court).

The *Davis* Court then noted that there was:

> an explicit congressional prohibition against judicial remedies for those in petitioner's position. When §717 was added to Title VII to protect federal employees from discrimination, it failed to extend this protection to congressional employees such as petitioner who are not in the competitive service.(fn 26) *See* 42 USC §2000(e)-16(a). There is no evidence, however, that Congress meant §717 to foreclose alternative remedies available to those not covered by the statute. Such silence is far from the "clearly

> discernable will of Congress" perceived by the Court of Appeals. . . . In a similar manner, we do not now interpret §717 to foreclose the judicial remedies of those expressly unprotected by the statute. On the contrary, §717 leaves undisturbed whatever remedies petitioner might otherwise possess.
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> Fn 26 [in opinion]: Since petitioner was not in the competitive service, *see* n. 2, *supra*, the remedial provisions of §717 of Title VII are not available to her. In *Brown v. GSA*, 425 U.S. 820 (1976), we held that the remedies provided by §717 are exclusive when those federal employees covered by the statute seek to redress the violation of rights guaranteed by the statute.

Davis v. Passman, 442 U.S., at 247 & n. 26.

The *Davis* Court then stated that if Congress:

> were . . . to create equally effective alternative remedies, the need for damages relief might be obviated.

Davis, 442 U.S., at 248.

However, there is no other statutory remedy for race discrimination available to Mr. Lee or any of the almost twenty thousand probation officers, pretrial services officers, deputy clerks and other support staff in the Federal Judiciary.[3] *Compare Bush v. Lucas*, 462 U.S., at 378 & n. 14, *with id.*, 462 U.S., at 390-391 (Marshall, J., concurring).

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[3] For data, *see* 1995 Year End Report by Chief Justice William H. Rehnquist On the Federal Judiciary, Part IV, www.uscourts.gov/ttb/jan96ttb/1yearend.html.

This complete absence of a statutory remedy for discrimination is why the *Bush* Court acknowledged the continuing vitality of *Davis v. Passman*. *Bush*, 462 U.S., at 376-378.

III. THE TWO STATUTORY SCHEMES IMPACT A LARGE SEGMENT OF JUDICIAL EMPLOYEES: DID CONGRESS LEGISLATIVELY OVERRULE *DAVIS V. PASSMAN*?

Title VII expressly provided an anti-discrimination remedy to most federal employees other than excepted service employees of the Legislative and Judicial Branches of the Federal Government. This provision in Section 717(a) of the Civil Rights Act of 1964, as amended, was enacted in 1972, when federal employees in the competitive service of all three branches of the government and the excepted service of the Executive Branch of government[4] were expressly granted coverage and protection against discrimination on the basis of race, sex, national origin, and religion. 42 U.S.C. §2000e-16(a). That the Court found this determinative in *Davis v. Passman, supra*, was reiterated in *Bush v. Lucas*, 462 U.S., at 376-378. CSRA changed none of this, as it continued the express lack of coverage over discrimination claims for persons like Petitioner in 5 U.S.C. §2302(a)(1), (b)(1)(A) by incorporating Section 717(a) *in toto* in the definition of

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[4] The Eleventh Circuit perhaps went astray by viewing CSRA as creating the competitive service and excepted service as new categories, Pet. App. 4a-5a; instead, CSRA merely codified extant categories. *See, e.g.*, 42 U.S.C. §2000e-16(a) [enacted in 1972], Pet. App. 31a-32a; *Davis v. Passman, supra* (involving excepted service employee).

"prohibited personnel practice." Pet. App. 31a-32a, 34a. *See also* Congressional Accountability Act, Pub.L. 104-1, 109 STAT. 3 *et seq.*, §§102(a)(2), 201(c)(2), 505; Pet. App. 33a-34a.[5] Accordingly, CSRA did not preempt Title VII's remedial scheme; it adopted it.

Congress knows how to legislatively overrule this Court's decisions. Congress left the "hole" in Section 717(a) that the *Davis* Court found dispositive in Ms. Davis' *Bivens* action. This precise statutory subsection left excepted service employees in the Legislative Branch and Judicial Branch agencies without a statutory remedy for race, or gender, discrimination. 42 U.S.C. §2000e-16(a) (1988). In the Congressional Accountability Act of 1995, *supra*, at §§102 & 201, Pet. App. 32a-33a, Congress did finally extend Title VII statutory remedies to Legislative Branch employees. Yet, the Congress clearly left Judicial Branch excepted service employees without any statutory remedy for race discrimination, and expressly inquired of the Judicial Conference of the United States what to do about the situation. *See* Congressional Accountability Act, *supra*, at §505, Pet. App. 33a-34a. Hence, *Davis v. Passman* has not been legislatively overruled, as Congress has not amended either §717(a) of Title VII or 5 U.S.C. §2302 of

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[5] Sections 102(a)(2) and 201(c)(1) of the Congressional Accountability Act of 1995 finally extended Title VII of the Civil Rights Act of 1964 and certain other labor and employment law statutes to all Congressional employees, amending §717(a) of the Civil Rights Act of 1964 so that only Judicial Branch excepted service employees, such as Petitioner, are still excluded from coverage. Pub. L. 104-1, 109 STAT. 3 *et seq.* Pet. App. 32a-33a.

CSRA to provide any statutory remedy for race, or gender, discrimination to Petitioner and other Judicial Branch excepted service employees.

The Eighth Circuit and the commentators are correct that *Davis v. Passman*, 442 U.S. 228 (1979), is still good law and is binding precedent in the case of excepted service employees of the Judicial Branch. *Compare Duffy v. Wolle, supra, with* 2 B. Lindemann & D. Grossman, EMPLOYMENT DISCRIMINATION LAW, p. 1565, "Employees of the Judicial Branch" (3rd ed. 1996).

Finally, the issue before this Court impacts the several thousand excepted service employees of the agencies within the Judicial Branch of the Federal Government. Undersigned counsel of record has inquired of one of the sponsors of the Congressional Accountability Act of 1995 and has been advised by his office that the Judicial Conference of the United States having responded to Congress under §505 of the Congressional Accountability Act of 1995, Pub. L. 104-1, 109 STAT. 3 *et seq.*, Pet. App. 33a-34a, by stating that Title VII need not be extended to Judicial Branch employees. Hence, the issue in this case remains statutorily unresolved and likely will not be legislatively resolved any time soon.

CONCLUSION

The Eleventh Circuit's decision erroneously leads to an inconsistency in the judicial relief afforded to race discrimination claims. The inconsistency flowing from the Court of Appeals' result is that Federal Government

employers in the Executive Branch agencies and (since 1995) in Legislative Branch agencies are judged in open court on race discrimination claims; state and local government employers are judged in open court on race discrimination claims; and private sector employers are judged in open court on race discrimination claims. Yet, Federal employers in Judicial Branch agencies would be relieved from answering in open court on claims of unconstitutional race discrimination in public employment. This is indeed inconsistent with *Davis v. Passman* and is inconsistent with the constitutional magnitude of race relations in our Nation's history.

The Petition should be granted.

Respectfully submitted,

MYLES E. EASTWOOD
Georgia Bar No. 237700

6445 Powers Ferry Road, N.W.
Suite 215
Atlanta, Georgia 30339-2909
(770) 541-9000

Counsel of Record for Petitioner
Kenneth W. Lee

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-8423

D.C. Docket No. 5:96-CV-316-3

KENNETH W. LEE,

Plaintiff-Appellant,

versus

ROBERT C. HUGHES, JR.;
DANIEL C. LANFORD, JR.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(July 9, 1998)

Before CARNES, Circuit Judge, KRAVITCH, Senior Circuit Judge, and MILLS*, Senior District Judge.

KRAVITCH, Senior Circuit Judge:

In this case, we must decide whether a federal employee who is not afforded an administrative or judicial remedy under the Civil Service Reform Act of 1978 (codified and amended in various sections of 5 U.S.C.)

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* Honorable Richard Mills, Senior U.S. District Judge for the Central District of Illinois, sitting by designation.

("CSRA" or "the Act") can bring a federal claim under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971), in order to recover monetary damages for alleged constitutional violations, and whether § 1981 provides a cause of action against individuals acting under color of federal law. We answer both questions in the negative.

I.

Kenneth W. Lee ("Lee" or "plaintiff") was hired as a U.S. Probation Officer for the Middle District of Georgia in 1983 and served in that capacity until his employment was terminated in 1996. At the time of Lee's termination, Daniel Lanford ("Lanford") was the Chief U.S. Probation Officer for the district, and Robert Hughes ("Hughes") was the Deputy Chief U.S. Probation Officer. Lee protested his termination on the ground that it was improperly motivated by race and sought redress through the Equal Employment Opportunity ("EEO") Plan for the Middle District of Georgia.[1]

A complainant seeking to initiate an action under the EEO Plan must file a timely discrimination complaint with the EEO Coordinator, who then makes the necessary investigation, consults with the parties, and prepares a report "identifying the issues, describing his or her findings and recommendations, explaining what resolution, if any, was achieved, and defining what corrective actions,

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[1] The EEO Plan adopted by the Middle District of Georgia is identical to the EEO plan that had been considered and approved by the Judicial Conference of the United States.

if any, will be undertaken."[2] If the complainant objects to the rejection or cancellation of the complaint, he may request that the Chief Judge of the district review the matter. The Chief Judge then must:

a. Conduct any additional investigation which he or she deems necessary;

b. Determine whether to interview the parties or other persons;

c. Determine whether to hold a formal hearing on the matter; and

d. Issue a final decision on the rejection, cancellation, or merits of the complaint if it is found that no interviews or hearings are necessary.[3]

A magistrate judge was appointed to investigate Lee's allegations and subsequently recommended approval of Lee's termination. The Chief Judge of the

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[2] EEO Plan at 2.

[3] EEO Plan at 3. The EEO Plan does not provide for a hearing upon request of the complainant, and the record does not suggest that plaintiff here requested a formal hearing subsequent to the Chief Judge's final decision in this case. In fact, it appears that plaintiff's attorney, in a letter sent to the Chief Judge that stated objections to Lee's potential termination, only *suggested* that a formal hearing would be appropriate at some future date. *See* Letter of March 14, 1996 ("I will be present at your court this afternoon and if some resolution cannot be had prior to the informal hearing scheduled for 1:30 p.m., then I would move the court to continue said matter to a date after the responses have been filed by the parties with the Probation Department, against whom the complaints will have been made. At that time, a formal hearing would be appropriate.").

district accepted the report and approved the termination. Lee then filed suit in district court against his supervisors in their individual capacities asserting a *Bivens* claim for alleged racial discrimination and alleging a violation of § 1981.

The district court dismissed the *Bivens* claim for lack of subject matter jurisdiction. Specifically, the court held that the CSRA is the exclusive vehicle through which federal employees can challenge or remedy adverse personnel decisions, even under circumstances in which the CSRA does not provide for administrative or judicial review of the personnel decision at issue. In the alternative, the district court dismissed both claims for failure to state a claim upon which relief could be granted. Lee appeals the dismissal of both claims.

II.

Lee contends that the district court erred in dismissing his *Bivens* claim, because he otherwise will not be afforded a judicial remedy for the alleged discrimination. Defendants, on the other hand, argue that Congress intended for the CSRA to be the exclusive vehicle through which federal employees can challenge adverse personnel decisions and that, as such, the CSRA precludes plaintiff's *Bivens* claim for damages. We review *de novo* the district court's decision to dismiss plaintiff's *Bivens* claim. *See McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996).

The CSRA "comprehensively overhauled the civil service system," *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 773, 105 S. Ct. 1620, 1624 (1985), and created

an elaborate "new framework for evaluating adverse personnel actions against [federal employees]," *id.* at 774, 103 S. Ct. at 1624. The CSRA details the protections and remedies available to federal employees in such actions, including the availability of administrative and judicial review. *See United States v. Fausto*, 484 U.S. 439, 108 S. Ct. 668 (1988). The CSRA divides civil service employees into three main classifications, *see* 5 U.S.C. §§ 3132, 2102, 2103; *Fausto*, 484 U.S. at 441 n. 1, 108 S. Ct. at 670 n. 1, within which employees are further classified as preference-eligible or nonpreference-eligible, *see* 5 U.S.C. § 2108. Specific protections and remedies available under the CSRA are dependent upon the civil service employee's classification within the Act. *See, e.g.*, 5 U.S.C. § 7511; *see generally Fausto*, 484 U.S. at 445-49, 108 S. Ct. at 672-75 (discussing various chapters within the CSRA and the protections provided therein). The parties do not dispute that Lee is a preference-eligible member of the excepted service and, as such, did not have the right to file a petition with the Office of Special Counsel ("OSC") of the Merit Systems Protection Board ("MSPB"). Although the remedies provided in the EEO Plan were available to Lee, the CSRA did not provide him with judicial or administrative review of the adverse personnel action alleged.

In *Fausto*, the Supreme Court considered whether the CSRA precluded judicial review under the Tucker Act, 28 U.S.C. § 1491, for nonpreference-eligible members of the excepted service who, under the CSRA, were not afforded administrative or judicial review of suspension for misconduct. After examining the purpose of the CSRA, the

entirety of the text, and the structure of review established by the Act, the Court held that the "CSRA established a comprehensive system for reviewing personnel action taken against federal employees," *id.* at 454, 108 S. Ct. at 677, and that Congress deliberately excluded certain employees from the provision establishing administrative and judicial review for adverse personnel actions. Although the *Fausto* Court specifically was considering the remedies afforded under the CSRA in the context of nonpreference-eligible members of the excepted service, this court has held that "*Fausto* applies to preference-eligible as well as non-preference employees." *Stephens v. Dept. of Health and Human Servs.*, 901 F.2d 1571, 1575 (11th Cir.) (holding that CSRA precluded *Bivens* claim for damages for allegedly prohibited personnel practice where, under the CSRA, the OSC refused to petition MSPB with plaintiff's complaint), *cert. denied*, 498 U.S. 998 (1990). Most notably, this court has recognized *Fausto* as "emphatically and conclusively establish[ing] the preemptive nature of the CSRA." *Id.*

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396, 91 S. Ct. 1999, 2005 (1971), the Supreme Court held that a plaintiff could state a cause of action and recover money damages against a federal official for constitutional violations occurring under the color of federal law. "A *Bivens* action is only permitted where 1) the petitioner has no alternative means of obtaining redress, and 2) there are no 'special factors counseling hesitation.' " *Stephens*, 901 F.2d at 1577 (citing *Bivens*, 403 U.S. at 396-97, 91 S. Ct. at 2005). The Supreme Court has limited the circumstances under which a *Bivens* claim may be asserted and has held:

> When the design of a Government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of the program's administration[, we have not created additional Bivens remedies].

Schweiker v. Chilicky, 487 U.S. 412, 423, 108 S. Ct. 2460, 2468 (1988).

Although this circuit has "recognized that the comprehensive statutory scheme established by Congress relating to federal employment (CSRA) precludes the maintenance of job-related *Bivens* actions by federal employees," *Stephens*, 901 F.2d at 1577, this case presents the court with a novel issue: whether a federal employee for whom the CSRA provides *no* administrative or judicial review for adverse personnel actions can assert a *Bivens* claim for monetary damages against individual defendants who allegedly have violated the complainant's constitutional rights. We hold that the CSRA precludes a *Bivens* remedy in this case notwithstanding the fact that the CSRA does not provide administrative or judicial review of the adverse personnel action.

Lee relies almost exclusively on *Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264 (1979), in support of his argument that he should be afforded a *Bivens* remedy here. His reliance is misplaced. In *Davis*, the federal-employee plaintiff, who was not protected by Title VII, brought a *Bivens* action for workplace discrimination. The Supreme Court held that a *Bivens* action was permissible because there was "no evidence . . . that Congress meant § 717 [of Title VII] to foreclose alternative remedies available to those not covered by the statute." *Davis*, 442 U.S. at 247,

99 S. Ct. at 2278. The Court noted that "[f]or Davis, as for Bivens, 'it is damages or nothing.' " *Id.* at 245, 99 S. Ct. at 2277. As an initial matter, the *Davis* Court did not consider the effect of the CSRA on Davis's *Bivens* claim because the CSRA had been enacted immediately prior to the ruling and the preemptive effect of the Act was not an issue before the Court. Furthermore, more recent Supreme Court cases do not reflect the *Davis* Court's willingness to recognize a *Bivens* claim in instances where there is a clear congressional intent to exclude certain classes of employees from a statute's comprehensive remedial scheme, as is the case with the CSRA. For example, in *Bush v. Lucas*, 462 U.S. 367, 388, 103 S. Ct. 2404, 2416 (1983), the court stated:

> Given the history of the development of civil service remedies and the comprehensive nature of the remedies currently available, it is clear that the question we confront today is quite different from the typical remedial issue confronted by a common-law court. The question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.

Accord United States v. Fausto, 484 U.S. 439, 108 S. Ct. 668 (1998).

We recognize that this case is troubling because plaintiff was not afforded a congressionally enacted judicial or administrative procedure through which to vindicate the alleged constitutional wrong. Since the creation of the *Bivens* cause of action, however, the Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts," *Schweiker v. Chilicky*, 487 U.S. 412, 421, 108 S. Ct. 2460, 2467 (1988), and specifically has held that the exclusion of certain classes of employees from the remedies provided by the CSRA reflects not congressional silence from which courts may imply that an excluded employee is "free to pursue whatever judicial remedies he would have had before enactment of the CSRA," *Fausto*, 484 U.S. at 447, 108 S. Ct. at 673 (considering CSRA's effect on the Tucker Act), but rather congressional intent to *deny* the excluded employee specific protections otherwise afforded by the Act, *see id.* In light of Congress's deliberate exclusion of certain employees from the protections of the CSRA and this country's long-respected separation of powers doctrine, courts should be hesitant to provide an aggrieved plaintiff with a remedy where Congress intentionally has withheld one.

Although "[n]o Supreme Court opinion holds squarely that the CSRA always prevents federal employees from bringing Bivens actions to right job-related wrongs," *Saul v. United States*, 928 F.2d 829, 836 (9th Cir. 1991), at least three courts of appeals have held that "the CSRA precludes even those *Bivens* claims for which the act prescribes no alternative remedy," *Saul*, 928 F.2d at 840. *See id.* (holding that "the CSRA is a special

factor counseling against recognition of a *Bivens* remedy"); *Lombardi v. Small Business Admin.*, 889 F.2d 959, 961 (10th Cir. 1989) ("The recent Supreme Court cases of *Fausto* . . . and in particular the most recent *Chilicky* case . . . indicate that the Court will not create a Bivens remedy in a Federal employment action even if no remedy at all has been provided by the CSRA."); *Volk v. Hobson*, 866 F.2d 1398, 1403-04 (Fed. Cir.) ("Whether or not an employee has access to all of the procedures and remedies of the CSRA . . . , it illustrates the logic inherent in the Supreme Court's admonitions to leave the federal personnel system to Congress[, which is in a] far better position to set the policy and adjust the system than judges confronting ad hoc situations and trying to fill perceived gaps in the program by allowing employees to prosecute Bivens suits against each other."), *cert. denied*, 490 U.S. 1092 (1989); *see also Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (holding that the CSRA does not prevent award of injunctive relief, but implying that the Act is a special factor militating "against the creation of a new nonstatutory damages remedy"). No circuit has held to the contrary.[4]

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[4] We recognize that the Eighth Circuit recently held that a local EEO Plan is not a special factor counseling hesitation and therefore allowed plaintiff's *Bivens* claim to proceed. *See Duffy v. Wolle*, 123 F.3d 1026, 1033 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1839 (1998). It appears that the defendants in *Duffy* never suggested that the CSRA preempted plaintiff's claim, but rather argued only that plaintiff's *Bivens* claim should have been dismissed because the local EEO Plan provided plaintiff with a remedy. Because the Eighth Circuit did not address the CSRA's effect on Duffy's *Bivens* claim, *Duffy* is not instructive here.

We agree with the Ninth Circuit's conclusion that "[t]he CSRA's comprehensive remedial provisions convince us that there was no inadvertence by Congress in omitting a damages remedy against supervisors whose work-related actions allegedly violate a subordinate's constitutional rights," *Saul*, 928 F.2d at 840, and accordingly hold that the CSRA is a special factor counseling against recognition of a *Bivens* suit here. In light of the comprehensive nature of the CSRA and the Supreme Court's conclusion that the exclusion of certain employees from judicial review of adverse personnel decisions reflects "manifestation of a considered congressional judgment," *Saul*, 928 F.2d at 840, plaintiff is precluded from asserting a *Bivens* claim in an attempt to recover damages for the constitutional violations alleged here.

III.

Lee contends, without citing supporting authority, that the district court also erred in holding that "§ 1981 does not support a cause of action for claims of employment discrimination arising under color of *federal* law." We review *de novo* the district court decision to dismiss the claim. *See McKusick v. City of Melbourne*, 96 F.3d 478, 482 (11th Cir. 1996). Because we agree with the district court's conclusion that Lee's allegations of discrimination cannot support a claim under § 1981, we affirm the dismissal of that claim.

Both circuit precedent and the text of § 1981 compel us to hold that a plaintiff cannot maintain a § 1981 claim against a federal defendant acting under color of federal

law. Prior to the Civil Rights Act of 1991, this court had held that a "suit against the federal defendant acting solely under color of *federal law* could not have been brought pursuant to any of the statutes enumerated in [42 U.S.C.] § 1988." *Martin v. Heckler*, 773 F.2d 1145, 1152 (11th Cir. 1985) (emphasis in original). Section 1981 is one of the statutes enumerated in § 1988. *See* 42 U.S.C. § 1988(b). Through the Civil Rights Act of 1991, Congress amended § 1981 and added subsection (c), which provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law." 42 U.S.C. § 1981(c). Accordingly, the language of § 1981 is clear: Section 1981 provides a cause of action for individuals subjected to discrimination by private actors and discrimination under color of state law, but does not provide a cause of action for discrimination under color of federal law.[5] Because we find no basis for Lee's

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[5] We are unaware of any court that has held otherwise. *Cf. Espinueva v. Garrett*, 895 F.2d 1164, 1165 (7th Cir.) ("Section 1981 does not apply to employment discrimination cases involving the federal government. . . . "), *cert. denied*, 497 U.S. 1005 (1990); *Williams v. Glickman*, 936 F.Supp. 1, 4 (D.D.C. 1996) ("Weighing the inconclusive legislative history and the statute's general statement of purpose against plain, unambiguous statutory language, the Court must apply the plain language of the statute and dismiss plaintiffs' § 1981 claim because the plaintiffs do not allege impairment of rights by nongovernmental discrimination or impairment under color of state law."); *Carlton v. Ryan*, 916 F. Supp. 832, 838 (N.D.Ill. 1996) (stating that "§ 1981 does not apply to the federal government"); *La Compania Ocho, Inc. v. U.S. Forest Serv.*, 874 F.Supp. 1242, 1250-51 (D.N.M. 1995) (noting that "section 717 of Title VII constitutes the exclusive remedy for federal government discrimination in the *employment* context,"

argument that § 1981 should afford him relief, we affirm the district court's dismissal of that claim.

IV.

Accordingly, we AFFIRM the district court's order dismissing Lee's claims for damages under *Bivens* and 42 U.S.C. § 1981.[6]

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but holding that § 1981 applies against the federal government for *non-employment* racial discrimination).

[6] We note that the district court was incorrect to conclude that it lacked subject matter jurisdiction, but was correct to dismiss for failure to state a claim. *See Bell v. Hood*, 327 U.S. 678, 682-83, 66 S. Ct. 773, 776 (1946). We therefore affirm the district court's judgment. *See Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992) ("[T]his court may affirm the district court where the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court.").

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KENNETH W. LEE, Plaintiff,	CIVIL ACTION NO. 5:96-CV-316-3
v.	Civil Order File Vol. 66, P. 6664
ROBERT C. HUGHES, JR. and DANIEL C. LANFORD, JR., Defendants.	

ORDER

(Filed Jan. 29, 1997)

The Court hereby **VACATES** its Order dated January 16, 1997 and enters the attached Order in its place. The Court enters this new Order to correct typographical errors and to make minor stylistic modifications in its earlier Order. Also, the Court inadvertently omitted the word "not" on page 8, line 6 of the earlier Order. The final sentence of the first paragraph of page 8 should read as follows: "Therefore, the Court's construing the language of § 1981 above as not covering claims against federal actors would *not* constitute a repeal by implication in this Circuit." The attached Order cures the omission in the earlier Order.

It is **SO ORDERED**, this 24th day of January, 1997.

/s/ Frank M. Hull
FRANK M. HULL
UNITED STATES DISTRICT JUDGE*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KENNETH W. LEE, Plaintiff,	) CIVIL ACTION NO. 5:96-CV-316-3
v.	)
ROBERT C. HUGHES, JR. and DANIEL C. LANFORD, JR., Defendants.	)

ORDER

Plaintiff Kenneth W. Lee brings this employment discrimination action against Defendants Robert C. Hughes, Jr. and Daniel C. Lanford, Jr. under § 1981 and the United States Supreme Court's opinion in *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). This matter is before the Court on Defendants' Motion to Dismiss [9-1].

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* The Honorable Frank M. Hull, United States District Court Judge for the Northern District of Georgia, is sitting by designation.

I. FACTS

In 1983, Plaintiff was hired as a United States Probation Officer for the Middle District of Georgia. Plaintiff served in this capacity until his employment was terminated in 1996. During the entirety of Plaintiff's tenure, Defendant Lanford was the Chief U.S. Probation Officer for the Middle District of Georgia and Defendant Hughes was the Deputy Chief U.S. Probation Officer for the District.

Plaintiff protested his termination, as well as poor performance evaluations and a demotion which preceded Plaintiff's termination, on the ground that they were improperly motivated by Plaintiff's race. Accordingly, the Chief Judge appointed United States Magistrate Judge Richard Hodge to investigate Plaintiff's allegation. Magistrate Judge Hodge recommended approval of the termination of Plaintiff's employment. Chief Judge Duross Fitzpatrick, relying on Magistrate Judge Hodge's report and recommendation, approved Plaintiff's termination. Plaintiff was notified of Chief Judge Fitzpatrick's decision by letter dated May 20, 1996.

On August 16, 1996, Plaintiff brought this action alleging that Defendants violated his rights under the equal protection component of the Fifth Amendment to the United States Constitution and under § 1981. On October 15, 1996, Defendants filed their Motion to Dismiss.

II. DISCUSSION

A. The Court Lacks Subject Matter Jurisdiction Over Plaintiff's Claims

Defendants contend that the Court lacks subject matter jurisdiction over Plaintiff's claims because of the Civil Service Reform Act of 1978 ("CSRA"). Specifically, Defendants contend that Congress intended for the CSRA to be the exclusive vehicle through which federal employees could challenge or remedy adverse personnel decisions. In the circumstances where the CSRA does not permit administrative or judicial review of the adverse personnel decision, Defendants contend that federal district courts (and the Court of Claims) lack the subject matter jurisdiction to inquire into the merits of that adverse personnel decision. This Court agrees.

The United States Supreme Court noted in *United States v. Fausto*, 484 U.S. 439 (1988), that the CSRA "comprehensively overhauled the civil service system," *id.* at 443 (quoting *Lindahl v. OPM*, 470 U.S. 768, 773 (1985)), creating an elaborate "new framework for evaluating adverse personnel actions against [federal employees]." *Id.* (quoting *Lindahl*, 470 U.S. at 774). The Supreme Court emphasized that the CSRA "prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative or judicial review." *Id.* In *Fausto*, the Supreme Court acknowledged that "no provision of the CSRA gives nonpreference members of the excepted service[1] the right to administrative or judicial review of suspension for misconduct," *id.*,

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[1] The CSRA divides civil service employees into three main classifications: (1) senior executive service; (2) competitive

which was the adverse personnel decision in issue in that case. Thus, the Supreme Court framed the issue to be decided: "whether [Congress's] withholding of remedy was meant to preclude judicial review for those employees, or rather merely to leave them free to pursue the remedies that had been available before enactment of the CSRA." *Id.* at 443-44. In *Fausto,* the Supreme Court decided that the former was true. *Id.* at 447.

Similar to the plaintiff in *Fausto,* Plaintiff here is a nonpreference member of the excepted service. Thus, the question becomes whether the CSRA gives a nonpreference member of the excepted service the right to judicial review of an adverse personnel decision when that employee claims that the adverse personnel decision is constitutionally infirm or when the adverse personnel decision purportedly violates a statutory right of the employee. The Court answers this question in the negative, especially since Congress addressed the issue of discrimination against federal employees within the CSRA.

The CSRA forbids federal agencies from engaging in certain "prohibited employment practice," including unlawful discrimination. 5 U.S.C. § 2302(b)(1)(A). The remedy the CSRA established for this violation, however, is that the employee may file a petition with the Office of

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service; and (3) excepted service. The excepted service is further divided into two categories: (a) preference eligibles; and (b) nonpreference eligibles. Plaintiff here is a nonpreference member of the excepted service.

the Special Counsel ("OSC") of the Merit Systems Protection Board ("MSPB") challenging the prohibited employment practice. The OSC then investigates the charges and, where appropriate, seeks remedial action. *See* 5 U.S.C. § 1206; *Fausto*, 484 U.S. at 446; *Spagnola v. Mathis*, 859 F.2d 223, 225-26 (D.C. Cir. 1988). *The CSRA does not give non-preference members of the excepted service the right to seek judicial review of such adverse personnel decisions. Fausto*, 484 U.S. at 443; *Spagnola*, 859 F.2d at 225.

Plaintiff does not challenge any of the foregoing. Instead, Plaintiff argues only that the CSRA is irrelevant here because he is not seeking judicial review of an agency action, but rather is seeking relief against Defendants in their individual capacities. However, the question is not who is sued, and in what capacity. Rather, the question is whether Plaintiff's casting the adverse personnel decisions against him as constitutional in nature, and as violations of § 1981, is only an attempt to have the merits of the adverse personnel decisions against him reviewed by this Court. *See Royals v. Tisch*, 864 F.2d 1565, 1568-69 (11th Cir. 1989). This clearly is the case here as the very essence of Plaintiff's claims are that the adverse personnel decisions that were made *regarding his employment* were because of his race. Therefore, the CSRA applies and Plaintiff cannot avoid its preemptive effects, irrespective of who Plaintiff has filed claims against and in what capacity they are sued.

In sum, Congress enacted the CSRA to "replace the haphazard arrangements for administrative and judicial review of personnel action." *Faust*, 484 U.S. at 444. Considering this purpose, and the elaborate nature of the CSRA's scheme, the Supreme Court, the Eleventh Circuit,

and several other courts have held that the CSRA preempts all other remedies which may have been available to federal employees challenging adverse personnel decisions. *See Faust, supra* (precluding claim based on Back Pay Act); *Stephens v. Department of Health and Human Services*, 901 F.2d 1571, 1576-77 (11th Cir. 1990) (precluding APA claims and *Bivens* claim); *Royals*, 864 F.2d at 1568-69 (rejecting Plaintiff's attempt to recast his claims in constitutional language); *see also Ayrault v. Pena*, 60 F.3d 346, 348 (7th Cir. 1995); *LeBlanc v. United States*, 50 F.3d 1025, 1030 (Fed. Cir. 1995); *McAuliffe v. Rice*, 966 F.2d 979, 981 (5th Cir. 1992); *Jones v. Tennessee Valley Authority*, 948 F.2d 258, 264 (6th Cir. 1991) (precluding Bivens claim); *Saul v. United States*, 928 F.2d 829, 840 (9th Cir. 1991) (precluding *Bivens* claim); *Lombardi v. Small Business Admin.*, 889 F.2d 959, 961 (10th Cir. 1989) (precluding *Bivens* claim); *Yokum v. United States*, 887 F.2d 276, 280-81 (4th Cir. 1989) (precluding *Bivens* claim); *McIntosh v. Turner*, 861 F.2d 524, 526-27 (8th Cir. 1988) (precluding *Bivens* claims against federal officers); *Diaz v. United States*, 853 F.2d 5, 9 (1st Cir. 1988).

Because the CSRA preempts all other remedies and does not give Plaintiff, a nonpreference member of the excepted service, a right to judicial review of any adverse personnel decision, this Court does not have subject matter jurisdiction over Plaintiff's claims against Defendants. Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's *Bivens* claims and Plaintiff's claims under § 1981.

B. Plaintiff's Complaint Fails To State A Claim Upon Which Relief Can Be Granted

Alternatively, Plaintiff's Complaint also fails to state claims upon which relief can be granted.

1. Plaintiff's Bivens Claim

Plaintiff alleges that Defendants violated his rights under the equal protection component of the Fifth Amendment. Generally, plaintiffs suffering constitutional injuries at the hands of federal officials may file *Bivens* actions to redress their injuries. *See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). However, the Supreme Court has held that a *Bivens* action will be defeated if Congress has provided an alternative remedy or if there are special factors counseling hesitation in the absence of clear action by Congress. *Id.* at 396-97; *see also Bush v. Lucas*, 462 U.S. 367, 377-78 (1983); *Carlson v. Green*, 446 U.S. 14, 18-19 (1980); *Davis v. Passman*, 442 U.S. 228, 245-47 (1979). The Supreme Court emphasized in *Schweiker v. Chilicky*, 487 U.S. 412 (1988), that when Congress has provided what it considers adequate remedies that the Court has not created additional *Bivens* remedies, as follows:

> [W]hen the design of a Government program suggests that Congress has provided what it considers to be adequate remedies for constitutional violations that may occur in the course of [the program's] administration [we have not created additional *Bivens* remedies].

Id. at 423.

Congress has provided what it considers adequate remedies for the violations Plaintiff alleges – the CSRA. The Eleventh Circuit repeatedly has held that "the comprehensive statutory scheme established by Congress relating to federal employment (CSRA) precludes the maintenance of job related *Bivens* actions by federal employees." *Stephens*, 901 F.2d at 1577; *McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987); *Wells v. FAA*, 755 F.2d 804, 810 (11th Cir. 1985); *see also Bush v. Lucas*, 462 U.S. 367, 388-90 (1983). Here, Plaintiff's claims undeniably are job related. Thus, the CSRA precludes the maintenance of Plaintiff's *Bivens* claims.

Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's *Bivens* claims against Defendants.

2. Plaintiff's § 1981 Claim

Likewise, Plaintiff's claims under § 1981 fail to state a claim because § 1981 does not support a cause of action for claims of employment discrimination arising under color of *federal* law. Congress amended § 1981 when it enacted the Civil Rights Act of 1991. Congress amended § 1981 to state that the rights protected by § 1981 are protected against impairment by nongovernmental discrimination and discrimination under color of state law, as follows:

> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental

> discrimination and impairment under color of State law.

42 U.S.C. § 1981(c). The statute, by its express terms, applies only in cases of discrimination by a private actor, or discrimination by a state actor. It does not apply in cases of discrimination by a federal actor. *See Williams v. Glickman*, 936 F. Supp. 1, 5 (D.D.C. 1996); *Gallardo v. Board of County Comm'rs*, 857 F. Supp. 783, 787 (D. Kan. 1994).

Plaintiff argues that construing the language of § 1981(c) in this manner is inappropriate because it would constitute what Plaintiff characterizes as a repeal by implication. Plaintiff bases his argument on the fact that prior to the Civil Rights Act of 1991, several authorities permitted § 1981 claims against federal actors. However, the Eleventh Circuit was not one of these authorities. While neither party has cited, and the Court has not discovered, any case where the Eleventh Circuit squarely has addressed the issue whether a plaintiff can maintain a § 1981 action against a federal actor, there are Fifth Circuit and Eleventh Circuit cases which strongly suggest that a plaintiff cannot.

For example, in *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985), the Eleventh Circuit stated that "[a] suit against the federal defendant acting solely under color of federal law could not have been brought pursuant to any of the statutes enumerated in section 1988." *Id.* at 1152. Section 1981 is one of the statutes enumerated in § 1988. Also, in *Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980), the old Fifth Circuit stated that the court in that case did not

have jurisdiction under 28 U.S.C. § 1343, the jurisdictional section for § 1981 and § 1983, because any deprivation in the case was under color of federal law. *Id.* at 984 n.1. Thus, the pre-Civil Rights Act of 1991 case law of this circuit apparently did not permit plaintiffs to bring § 1981 claims against federal actors. Therefore, the Court's construing the language of § 1981 above as not covering claims against federal actors would not constitute a repeal by implication in this Circuit.

Moreover, to the extent Congress "repealed" *any* language residing in § 1981 prior to its amendment, Congress did not do so by implication. Rather, Congress clarified the prior language of § 1981 by explicitly adding new language stating that the rights protected by § 1981 are protected against impairment by nongovernmental discrimination and discrimination under color of state law.[2] In so doing, Congress did not repeal any language

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[2] In fact, Congress did not repeal any language in § 1981. Prior to the enactment of the Civil Rights Act of 1991, § 1981 provided, in its entirety, as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988). When Congress amended § 1981 in 1991, it retained the above language and placed it in subsection (a) of the amended statute. Congress then added new language to § 1981, including the language noted above in § 1981(c). Thus,

of the prior § 1981 more so than it repealed prior judicial interpretations of § 1981. "The courts frequently find Congress to have done this." *Fausto*, 484 U.S. at 453.

For all of the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiff's claims under § 1981 against both Defendants.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion to Dismiss [9-1] and hereby dismisses Plaintiff's Complaint.

It is **SO ORDERED**, this 24th day of January, 1997.

/s/ Frank M. Hull
FRANK M. HULL
UNITED STATES DISTRICT JUDGE*

Congress did not repeal any thing in § 1981, by implication or otherwise. Congress merely added new language to the statute to clarify against whom claims can be brought.

* The Honorable Frank M. Hull, United States District Court Judge for the Northern District of Georgia, is sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

KENNETH W. LEE, Plaintiff,	:	CIVIL ACTION NO. 5:96-CV-316-3
v.	:	
ROBERT C. HUGHES, JR. and DANIEL C. LANFORD, JR., Defendants.	:	

ORDER

(Filed Apr. 2, 1997)

This matter is before the Court on Plaintiff's Motion to Alter, Amend, Vacate, and Set Aside Amended Judgment [22-1]. The Court **DENIES** Plaintiff's Motion to Alter, Amend, Vacate, and Set Aside Amended Judgment for the reasons outlined below.

I. DISCUSSION

A. Civil Service Reform Act

In the Court's Order filed on January 29, 1997, the Court, as way of background, labeled Plaintiff as a nonpreference member of the excepted service. The Court then stated that as a nonpreference member of the excepted service, Plaintiff had a right to challenge his adverse employment action by filing a petition with the Office of Special Counsel ("OSC") of the Merit Systems Protection

Board. This was incorrect. Instead, Plaintiff was a preference eligible member of the excepted service in the judicial branch and did not have the right to file a petition with the OSC.

Because of the Court's misperception in this regard, Plaintiff contends that the Court's ruling that Plaintiff's *Bivens* claim was preempted by the Civil Service Reform Act ("CSRA") should be set aside. The Court disagrees.

The Court's mislabelling of Plaintiff's federal employee status was immaterial to its ruling. The operative fact for purposes of the Court's analysis was that the CSRA does not provide Plaintiff the right to administrative or judicial review of the merits of any adverse personnel decision. This fact, which Plaintiff does not contest, is the only fact that matters because it is the absence of any right to judicial review which deprives the Court of subject matter jurisdiction over Plaintiff's *Bivens* and § 1981 claims.[1]

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[1] In *United States v. Fausto*, 484 U.S. 439 (1988), the United States Supreme Court noted that the CSRA did not eliminate any statutory remedy the plaintiff in *Fausto* may have had under the Back Pay Act, 5 U.S.C. § 5596. *See Fausto*, 484 U.S. at 453. The Supreme Court noted that Congress knows how to repeal a statute and generally does not do so silently or by implication. However, the Supreme Court also noted that Congress *has* been known to have implicitly repealed a legal disposition or judicial interpretation of a statute. *Id.* Thus, while the Back Pay Act remains an operative part of the integrated statutory scheme Congress set up to protect civil servants, all other then existing remedies, with the possible exception of any other non-repealed express statutory remedy, are now preempted by the CSRA. Thus, Plaintiff's *Bivens* claim is preempted.

As for Plaintiff's § 1981 claim, the Court found that Plaintiff's Complaint did not state a claim under § 1981 because

After determining that Plaintiff has no right to judicial review under the CSRA, the primary focus of the Court's analysis centered on whether the CSRA in fact applies in this case and whether the CSRA's not granting a right to judicial review preempts Plaintiff's *Bivens* and § 1981 claims. The Court's determination that the CSRA does apply and that it does [sic] preempts Plaintiff's claims remains unaltered, as does the Court's rejection of Plaintiff's arguments to the contrary. Regardless of whether any remedy is available under the CSRA for an adverse personnel decision, that statute has "preempted the field by 'superseding preexisting remedies for all federal employees.' " *Ayrault v. Pena*, 60 F.3d 346, 348 (7th Cir. 1995); *see also Royals v. Tisch*, 864 F.2d 1565 (11th Cir. 1989).

Thus, while the Court mischaracterized Plaintiff's federal employee status, the primary focus of the Court's analysis remains unaltered and the result is the same. Accordingly, the Court finds that setting aside the judgment in this action is unwarranted.

B. Bivens

Also unaltered is the Court's determination that Plaintiff's *Bivens* claim fails because the CSRA constitutes a special factor counseling against creating a *Bivens* cause of action in the federal employment context. *Stephens v.*

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§ 1981 does not provide remedies for discrimination under color of *federal* law. However, to the extent that any pre-CSRA courts interpreted § 1981 to provide such a remedy, it also is now preempted by the CSRA because any such remedy is not expressly provided for in the statute.

Department of Health and Human Servs., 901 F.2d 1571, 1577 (11th Cir. 1990). Moreover, Congress amended the Back Pay Act, 5 U.S.C. § 5596, in 1990 specifically to provide employees of the judicial branch with a backpay remedy for "unjustified or unwarranted" personnel actions in appropriate circumstances. 5 U.S.C. § 5596(b)(1). Such a remedy is not precluded by the CSRA. *United States v. Fausto*, 484 U.S. 439, 453 (1988). This remedy provided by Congress also defeats Plaintiff's *Bivens* claim.[2]

For the foregoing reasons, the Court **DENIES** Plaintiff's Motion to Set Aside the Judgment.

II. CONCLUSION

The Court **VACATES** the portion of the Court's Order filed on January 29, 1997 mislabeling Plaintiff's federal employee status and stating that Plaintiff had a right to file a petition with the OSC. The Court **DENIES** Plaintiff's Motion to Alter, Amend, Vacate, and Set Aside the Amended Judgment [22-1].

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[2] Plaintiff does not move to set aside the Court's judgment with respect to Plaintiff's § 1981 claim.

It is **SO ORDERED**, this 1st day of April, 1997.

/s/ Frank M. Hull
FRANK M. HULL
UNITED STATES DISTRICT JUDGE*

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* The Honorable Frank M. Hull, United States District Court Judge for the Northern District of Georgia, is sitting by designation.

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Statutes:

Title VII of Civil Rights Act, as amended:

Section 717 (a), as added by Equal Employment Opportunity Amendments of 1972, Pub.L. 92-261, 42 U.S.C. §2000e(16)(a):

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in

the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Congressional Accountability Act of 1995, Pub.L. 104-1, 109 Stat. 3 *et. seq.*:

Section 102, APPLICATION OF LAWS.

(a) LAWS MADE APPLICABLE – The following laws shall apply, as prescribed by this Act, to the legislative branch of the Federal Government:

* * *

(2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et. seq.*)

* * *

Section 201. RIGHTS AND PROTECTIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967, THE REHABILITATION ACT OF 1973, AND TITLE I OF THE AMERICANS WITH DISABILITIES ACT OF 1990.

* * *

(c)(1) Section 717 of the Civil Rights Act of 1964 – Section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16) is amended by –

(A) striking "legislative and";

(B) striking "branches" and inserting "branch"; and

(C) inserting "Governmental Printing Office, the General Accounting Office, and the" after "and in the".

* * *

Section 505. JUDICIAL BRANCH COVERAGE STUDY

The Judicial Conference of the United States shall prepare a report for submission by the Chief Justice of the United States for the Congress on the application to the judicial branch of the Federal Government of –

(1) the Fair Labor Standards Act of 1938 (29 U.S.C. 201 *et. seq.*);

(2) Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et. seq.*);

(3) the Americans With Disabilities Act of 1990 (42 U.S.C. 12101 *et. seq.*);

(4) the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 *et. seq.*);

(5) the Family and Medical Leave Act of 1993 (29 U.S.C. 2611 *et. seq.*);

(6) the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et. seq.*);

(7) Chapter 71 (relating to Federal service labor-management relations) of Title 5, United States Code;

(8) the Employee Polygraph Protection Act of 1988 (29 U.S.C. 2001 *et. seq.*);

(9) the Worker Adjustment & Restraining Notification Act (29 U.S.C. 2101 *et. seq.*);

(10) the Rehabilitation Act of 1973 (29 U.S.C. 701 *et. seq.*); and

(11) Chapter 43 (relating to veterans' employment & re-employment) of Title 38, United States Code.

The report shall be submitted to Congress not later than December 31, 1996, and shall include any recommendations the Judicial Conference may have for legislation to provide the employees of the judicial branch the rights, protections, and procedures under the listed laws, including administrative and judicial relief, that are comparable to those available to employees of the legislative branch under titles I thru IV of this Act.

The Civil Service Reform Act of 1978:

5 U.S.C. §2302

(a)(1) For purposes of this Title, "prohibited personnel practice" means any action described in subsection (b) of this section.

* * *

(b) Any authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority –

(1) discriminate for or against any employee or applicant for employment –

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under Section 717 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16); . . .

Civil Rights Act of 1866; as amended by Pub.L. 102-166, Title I, §101, 105 Stat. 1071:

42 U.S.C. §1981(c)

> The rights protected by this section are protected against impairment by nongovernment discrimination and impairment under color of State law.